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Attorney-Client Privilege Arising out of Internal Investigations: Milestone Decision of the Swiss Federal Supreme Court

In a decision released early this week (1B_85/2016 dated 20 September 2016), the Swiss Federal Supreme Court ("SFSC") had to address the issue if and to what extent documents, such as reports, memoranda or interview notes, prepared by or with the assistance of outside legal counsel in the frame of internal investigations are protected by attorney-client privilege and thus can be withheld from the criminal prosecution authorities.

The purpose of this briefing is to summarize the SFSC's reasoning and anticipate the practical impact of this latest case law for corporations, in particular financial intermediaries subject to the Anti-Money Laundering Act ("AMLA"), when involving external legal counsel in connection with internal investigations.

Background

Corporations that either on their own initiative or at the request of regulators evaluate the effectiveness of their compliance structures or investigate potential non-compliance with applicable laws and regulations frequently resort to law firms to assist them with their investigative efforts and to get their opinion on the risk situation and potential exposure to civil, regulatory and criminal liability.

The services provided by such law firms typically include review of corporate policies, internal correspondence, meeting minutes of corporate functions at different levels of the corporate ladder as well as interviews with policy owners and/or potentially exposed individuals. The work product provided by these law firms typically takes the form of a report or memorandum where a summary of the facts found as well as the findings based on the investigative efforts are set out. Frequently, the report will also include an aggregate of the interviews conducted with employees of the corporation. In its decision 1B_85/2016 reported herein, the SFSC had to deal with prosecutor's access to the work product of internal investigations. More specifically, the SFSC had to address the question if and to what extent such reports and memoranda, prepared by or with the assistance of law firms, are protected by attorney-client privilege.

Summary of the matter submitted to the SFSC

The matter submitted to the SFSC relates to an investigation by the Office of the Attorney General of Switzerland ("OAG") against a former bank employee, suspected to have been involved in money laundering and document forgery while working as a client advisor at the bank. The OAG ordered the bank to produce all minutes of management and board meetings dealing with the accounts which had allegedly served to process corrupt payments to Greek officials. The OAG also ordered the bank to produce all the documents arising out of the internal investigation that it had conducted, with the assistance of external legal counsels, in connection with the relevant accounts.

In response to such production order, the external legal counsels (a Swiss and a UK law firm) requested the sealing of, among other things, their draft investigation report, as well as the notes of interviews that they had conducted with the suspected employee and other employees. The competent court, upon application of the OAG, ordered the unsealing of substantially all these documents (subject to certain redacted sections). The bank and the external legal counsels then appealed this decision before the SFSC, in particular on the grounds that the relevant documents are covered by attorney-client privilege and thus cannot be made available to the criminal prosecution authorities.

The SFSC's reasoning

The SFSC dismissed the appeal. Against the arguments of the appellants, the SFSC reached the conclusion that the litigious draft investigation report and notes of employees' interviews were not covered by attorney-client privilege.

The SFSC is not questioning that the advice provided by external counsel on legal issues relating to compliance with money-laundering regulations is, in principle, protected by attorney-client privilege. However, such privilege no longer applies where the bank *in effect delegates to external counsel its compliance-related obligations* under the AMLA and its relevant ordinances. According to the SFSC, compliance (including the monitoring/controlling and documenting thereof) is a general obligation of the bank and cannot be brought under the protection of attorney-client privilege if outsourced to external counsel, as this is not part of typical legal counsel work. Deciding otherwise could jeopardize the effectiveness of the AMLA. As a consequence, work products emanating from such atypical work cannot be withheld from production to prosecutors based on privilege. In addition, informal interviews with employees cannot be withheld pursuant to the prohibition of self-incrimination (*nemo tenetur se ipsum accusare*), to the extent that they were not conducted under the threat of criminal penalties.

Practical impact

The practical impact of decision 1B_85/2016 is significant, notably for financial intermediaries (such as banks, insurance companies, securities dealers, external asset managers, etc.) that are subject to the AMLA. Indeed, it leads to broad access of prosecutors to information and work products created by or with the assistance of outside legal counsel in the frame of corporate investigations, in particular where the nature and scope of such an investigation amount to an actual outsourcing of AMLA-related duties. Moreover, given that there are no criminal sanctions attached to an employee's refusal to answer questions in informal interviews conducted within a corporate investigation, the *nemo tenetur se ipsum accusare* principle will typically also not be available as a basis to withhold production. Protection, however, remains available where such interviews were conducted as part of typical defense counsel work.

As a practical consequence, the SFSC's decision encourages prosecutors to defer their actual prosecution until the completion of the corporate investigation, as it will then be easier for the prosecutors to argue that the investigative actions were not taken as part of a defense strategy in pending criminal proceedings. This seems all the more true where (as was the case here) the relevant entity is not itself the subject matter of the criminal prosecution.

To the extent possible, corporate investigations should therefore be conducted as the fact finding part in the building of the criminal defense in pending or anticipated criminal proceedings. Corporations and external counsel also need to ensure that the mandate for which external counsel is retained does not lead to an actual outsourcing of compliance or controlling functions that are typically the duty of the corporation itself. Rather, the mandate should primarily focus on legal advice and serve the defense of the corporation; thus, it should be structured with a more forward looking approach than is typically the case where mere risk analysis and evaluations are requested from external counsel.

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